Office Supreme Court, U.S.
FILED
SEP 3 1957
JOHN T. FEY, Clerk

No. 244

In the Supreme Court of the United States

October Term, 1956.

C. ED HACKENDORF, *d/b/a* SUN BEARING SUPPLY,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

Reply to the Brief for the United States in Opposition

R. F. ROBERTS,
420 Guaranty Building,
Beaumont, Texas,

S. J. CLENDENNING,
502 Biltz Building,
Tulsa, Oklahoma,
Attorneys for Petitioner.

INDEX.

PAGE

Reply to Question Presented 1

Reply to Respondent's Arguments 3

Certification of Service 8

TABLE OF CASES.

Biltrite Tire Co. v. The King, 1937 Canada Law Rep. 364 5

Brooklyn Cooperage Co. v. City of New Orleans, 17 So. 804 5

Clawson & Bals v. Harrison, (7 Cir.) 108 F. 2d 991 5

Doyle v. Mitchell Bros. Co., 247 U. S. 179, 185, 38 S. Ct. 467 3

Eisner v. Macomber, 252 U. S. 189, 206, 207, 40 S. Ct. 189 3

Merchants Loan & Trust Co. v. Smietanka, 41 S. Ct. 386, 255 U. S. 509 ..... 3, 4, 6

Micromatic Hone Corp. v. Mid-West Abrasive Co., (6th Cir.) 177 F. 2d 934, 938 ..... 5, 7

Tidewater Oil Co. v. United States, (10th Cir.) 171 U. S. 108, 18 S. Ct. 837 ..... 5, 7

Union Trust Co. of Pittsburgh v. Commissioner of Internal Revenue, (C. C. A., 1940) 115 F. 2d 86, cert. den. 61 S. Ct. 744, 312 U. S. 700 ..... 3, 4

United States v. Armature Exchange, Inc., (9th Cir.) 116 F. 2d 969 7

United States v. Safety Car Heating & Lighting Co., (N. J., 1936) 56 S. Ct. 353, 297 U. S. 88, 80 L. ed. 500 3

Wilson v. Simpson, 13 L. ed. 66, 60 U. S. 109 ..... 4, 5

IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1956.

No. 244

C. ED HACKENDORF, *d/b/a* SUN BEARING SUPPLY,
Petitioner,

vs.

UNITED STATES OF AMERICA, - - - - - *Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

REPLY TO THE BRIEF FOR THE UNITED STATES IN OPPOSITION.

Reply to Respondent's Statement of the Question Presented.

Respondent's statement that the question presented is whether the District Court and the court below erred in holding that, in the circumstances of the case, the taxpayer's sale of his automobile engine is the sale of an automobile part within the meaning of the statute, is, of course, not true. The question as to whether or not the motor as such is an automobile part is neither raised in the pleadings nor the claim for refund.

The basis of the tax is, of course, the sale price, or the reasonable market value. The tax accrues at the time of the sale or at the time of the use.

Neither the sale price, or the market value, nor the event of the sale determines the taxability.

The taxability issue rests entirely upon whether petitioner is the manufacturer of what he sells or uses.

Petitioner states in paragraph 9 of his original complaint the following:

> "Plaintiff does machine, or 'rebuild,' some of the old used parts, as alleged in subparagraph (a) of paragraph No. 6, above, and, for the limited purpose of this suit, admits a tax is due under the 1939 Code * * * upon his sale of, or his use as components of: (here mentioned parts machined)."

In his claims for refund Petitioner states:

> "The tax is limited to the sale price of only the old used parts reworked, or machined, by taxpayer. The tax does not apply to subsequent sales by taxpayer, a purchaser of new automobile parts, purchased tax paid by him, from other manufacturers. The putting together by taxpayer of new automobile parts complete in themselves purchased tax paid, with old parts machined by him, which are also complete with themselves, and on which he paid the tax, does not result in another and different taxable article."

Petitioner is engaged in several activities. He buys and sells new parts; he resurfaces, by machining, the old parts partially worn; and he disassembles, cleans and reassembles old motors.

The buying and selling, or buying and using, of new parts, taken alone, does not incur the tax. Neither does the disassembling, cleaning and reassembling, taken alone, incur the tax.

After conceding, for the limited purpose of this suit, that machining a few of the specific partially worn parts is taxable, does such machining of such partially worn parts render all activities taxable which would not be taxable but for the machining.

Petitioner's theory is that he would pay the tax on the components, or particular parts, machined, whether sold or used in reassembling, that is, he would pay a tax on the increment in value resulting from his machining operation.

Petitioner's further theory is that he would owe no tax on the mere re-assembly and sale of a second-hand motor, since there would be no increment in value resulting from his assembly operations. (This is clearly recognized by the last paragraph of Article 4.)

Under Petitioner's theory Respondent would receive a tax on all new manufacturing.

Reply to Respondent's Arguments.

The difficult task involved in this case is determining what rule of law to use to define "manufacturer" or "manufacturing."

Congress, in enacting the statute, in 1932, did not define "manufacturer" or "manufacturing."

The meaning of words in a congressional enactment, when Congress does not otherwise indicate, is the ordinary meaning, or the meaning used in common speech. *United States* v. *Safety Car Heating & Lighting Co.*, (N. J., 1936) 56 S. Ct. 353, 297 U. S. 88, 80 L. ed. 500, reversing 76 F. 2d 133; *Union Trust Co. of Pittsburgh* v. *Commissioner of Internal Revenue*, (C. C. A., 1940) 115 F. 2d 86, cert. den., 61 S. Ct. 741, 312 U. S. 700; *Merchants Loan & Trust Co.* v. *Smietanka*, 41 S. Ct. 386, 255 U. S. 509; *Doyle* v. *Mitchell Bros. Co.*, 247 U. S. 179, 185, 38 S. Ct. 467; *Eisner* v. *Macomber*, 252 U. S. 189, 206, 207, 40 S. Ct. 189.

The Third Circuit in *Union Trust Co. of Pittsburgh* stated:

> "The courts, unless Congress orders otherwise, fall back upon old friend 'ordinary meaning'."

This Court, in *Merchant's Loan & Trust Co. v. Smietanka*, stated:

> "In determining the definition of the word 'income' thus arrived at, this Court has consistently refused to enter into the refinements of lexicographers or economists, and has approved, in the definitions quoted, what it believed to be the commonly understood meaning of the term which must have been in the minds of the people when they adopted the Sixteenth Amendment to the Constitution."

The case of *Wilson v. Simpson*, 13 L. ed. 66, 60 U. S. 109, heavily relied on by Petitioner, spelled out a definition, at general law, of "reconstruction" as well as the antithesis thereof, namely "repair." The Congress did not define "repair" or "reconstruction" in the patent statute involved, and the courts then were privileged to rely upon the meaning at general law. This Court, after defining the words "reconstruction" and "repair" at general law, then applied the patent statute involved. The definition by this Court in *Wilson v. Simpson* is not limited to patent cases. Such definition is the commonly understood meaning of the words wherever used.

The same should be true here. Congress having failed to define "manufacturer" or "manufacturing," in Section 3403 (c), the courts are privileged to look to the general law for such definition. After determining the definition of "manufacturer" and "manufacturing" at general law then, and only then, can Code Section 3403 (c) be applied to the facts of this case.

This Court in *Tidewater Oil Co.* v. *United States*, 171 U. S. 108, 18 S. Ct. 837, gave five examples of putting completed components together, and held that putting them together did not constitute manufacturing.

The Supreme Court of Louisiana in *Brooklyn Cooperage Co.* v. *City of New Orleans*, 17 So. 804, held that putting components together was not manufacturing.

In the case at bar, the Petitioner's operations are either filing, grinding or cutting (*Wilson* v. *Simpson*); Petitioner only removes material from the original part, and never adds new material. The weight of authority in this country holds that this is the dividing line between repair and reconstruction. *Micromatic Hone Corp.* v. *Mid-West Abrasive Co.*, 177 F. 2d 934, 938.

The line of cases relied upon by the Tenth Circuit, and cited by Respondent herein, is that which begins with *Clawson & Bals* v. *Harrison*, (7th Cir.) 108 F. 2d 991. This case cites as authority the Canadian case of *Biltrite Tire Co.* v. *The King*, 1937 Canada Law Rep. 364. Each of these cases would fall in that class where material was added to the original article, and not in the class of merely filing, grinding and cutting, as in the case at bar.

However that may be, these cases relied upon by the Tenth Circuit express what the Canadian people think and not what the people of the United States thought at the time Code Section 3403 (c) was enacted.

It has never before been held, in construing statutes enacted by our Congress, that the meaning of the words used in the Acts of Congress should be governed by the meaning placed on those words by the British people, in lieu of the meaning placed on these same words by the people who adopted the Constitution. On this subject, this Court

in *Merchants' Loan & Trust Co.* v. *Smietanka, supra,* stated:

> "The British income tax decisions are interpretations of statutes so wholly different in their wording from the acts of Congress which we are considering that they are quite without value in atriving at the construction of the laws here involved."

At the time the Code was enacted in 1932, no evidence was given on the matter of "repair" or "reconstruction." However, in 1941 the question was brought to the attention of the Senate Committee on Finance, composed of Senators Taft, George, Connally, and others. After hearing evidence that committee refused to change the "ordinary meaning" of the words "repair" and "reconstruction," thereby leaving the definitions existing at general law in effect.

Senators Taft and Connally, in 1941, considered that only the particular part reworked was considered. Senator Taft stated:

> "Senator Taft (interposing): I do not care what the business or the trade does with it, but the important question is the work that is done on the old part."

Senator Connally stated:

> "Senator Connally: Do they tax them just on the cost of the particular part that goes into the repairs?"

The Senate Committee on Finance in 1951 in eliminating the value of the old part from tax stated:

> "Only the value added in this case could be considered as new manufacturing, since in effect the car owner already owned the old part."

The Tenth Circuit made no distinction whatsoever between an individual part and a "combination." In doing so

it is in conflict with the 9th Circuit in *United States* v. *Armature Exchange, Inc.*, 116 F. 2d 969, with the 6th Circuit in *Micromatic Hone Corp.* v. *Mid-West Abrasive Co.*, 177 F. 2d 934, 938, and with this Court in *Wilson* v. *Simpson*, and *Tidewater Oil Co.* v. *United States*.

We do not believe that the statute involved can be applied to the facts of the case until a definition is settled upon spelling out the meaning of the words involved, and that the definition spelled out should be applicable to all parts and combinations under the statute. Respondent's Treasury Department has made one definition for a generator combination, and another definition for a motor combination. Such, we think, is unconstitutional, and should render the entire act void. A generator dealer should not be given preference over a motor dealer. Respondent is guilty of doing just that.

We think this Court should take jurisdiction and settle the question involved.

Wherefore, Petitioner prays as he has heretofore prayed in his Petition.

R. F. ROBERTS,
420 Goodhue Building,
Beaumont, Texas,

S. J. CLENDINNING,
802 Ritz Building,
Tulsa, Oklahoma,
Attorneys for Petitioner.

CERTIFICATE OF SERVICE.

I hereby certify that I have this the . . day of August, 1957, served two copies of the above Reply to the Brief for the United States in Opposition by mailing one copy to Hon. B. Hayden Crawford, U. S. Attorney, Tulsa, Okla., and one copy to Hon. Chas. K. Rice, Assistant Attorney General, Washington, D. C., Attorneys of Record for Respondent.

. . . . . ,

R. F. ROBERTS.